SYED IBRAHIM SYED MOHD & ORS

v.

ESSO PRODUCTION MALAYSIA INCORPORATED

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD NOOR AHMAD JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: T-02-551-1998]
23 DECEMBER 2003

STATUTORY INTERPRETATION: *Retrospective operation - Subsidiary legislation - Subsidiary statute dealing with accrued rights - Whether could operate retrospectively - Factors to be considered - Legislative intent - Whether power to enact subsidiary statute with retrospective effect to be clearly spelt out in parent Act - Employment Act 1955, ss. 2B, 7, 7A, Part XII - Interpretation Acts 1948 and 1967, ss. 20, 30*

STATUTORY INTERPRETATION: *Interpretation Act - Interpretation Acts 1948 & 1967 - Application to subsidiary legislation - Power to make subsidiary legislation with retrospective operation - Whether not provided for by Acts - Pending proceedings on vested or accrued rights - Whether protected by s. 30 thereof - Interpretation Acts 1948 and 1967, ss. 20, 30 - Employment Act 1955, ss. 2B, 7, 7A, Part XII*

The appellants filed several claims against the respondent/employer in the Labour Court claiming overtime, rest day and annual leave payments allegedly due to them under Part XII of the Employment Act 1955 ('the Act'). Although the claims were filed on 6 February 1995 it was not until 10 December 1997 that the same were heard by the court. In the meanwhile, on 10 October 1997, a subsidiary legislation which applied retrospectively to 1 October 1974 ('the Exemption Order') was gazetted by the Minister exempting the respondent from the provisions of Part XII of the Act. At the inquiry before the Labour Court, the respondent raised an objection that the court, by virtue of the Exemption Order, had no jurisdiction to hear the claims. The Labour Court subscribed to the objection and hence dismissed the claims. The appellants appealed but the High Court affirmed the Labour Court's ruling, adding that, until it was declared null and void the Exemption Order applied to the claims. The appellants appealed further and the primary issue that arose was whether the appellants' claims herein could be defeated by the Exemption Order bearing in

mind *inter alia* the principles governing retrospective legislation and the purport of: (i) ss. 20 and 30 of the Interpretation Acts 1948 and 1967 ('Interpretation Acts'); and (ii) ss. 7 and 7A of the Act.

Held (allowing the appeal):
Per Mokhtar Sidin JCA delivering the judgment of the court

[1] A subsidiary legislation with retrospective effect would apply to procedural matters but not to a right. A right could not be taken away retrospectively unless the parent Act, by express provision or by implication, provides for the making of such retrospective subsidiary legislation. (pp 909 h & 910 a-b)

[2] The appellants' claims were rights that accrued to them but were taken away by the Exemption Order. Obviously, without the Exemption Order the appellants were entitled to the claims as provided by Part XII of the Act. By filing their claims with the Labour Department the appellants had established their rights. There is therefore no merit in the submission that the claims were not rights protected by the law. (p 921 a-b)

[3] A body is empowered to make subsidiary legislation only when the parent Act provides it with such power. For that subsidiary legislation to have retrospective effect the parent Act must also provide that body with power to make the subsidiary legislation with retrospective effect. This power could not be provided by s. 20 of the Interpretation Acts as submitted by the respondent for the simple reason that the Interpretation Acts have no power to provide a person to make a subsidiary legislation with retrospective effect. Though the said s. 20 has been amended, that did not change the character of the Interpretation Acts. It follows that in the present case, in order to give the Exemption Order retrospective effect, the Act must make provisions for it. There is no such provisions in the Act. (p 922 b-f)

[4] By s. 30 of the Interpretation Acts, a vested right or an accrued right could not be taken away by a legislation or subsidiary legislation with retrospective effect. In the present case, the appellants have acquired the rights when they filed their said claims. In other words, the Exemption Order was non-existent when they filed the claims with the Labour Department, Dungun, and as such the claims became accrued or vested rights and therefore protected by s. 30 of the Interpretation Acts.

Consequently, the Exemption Order, which has the effect of exempting the respondent from the provisions of Part XII, has no effect on the claims notwithstanding the retrospective effect. This apart, s. 30(1) of the Interpretation Acts gives additional protection to legal proceedings which had been instituted in respect of these rights. The claims by the appellants, therefore, should be proceeded upon by the Labour Court on the merits as if the Exemption Order had not been made. (pp 923 c & 925 a-d)

[5] Whilst there were merits in the appellants' contention that the claims were also protected by ss. 7 and 7A of the Act, there is no necessity for the court to decide on the issue. The protection provided by s. 30 of the Interpretation Acts, as it were, is more than sufficient to protect the claims of the appellants. (p 927 c)

[Labour Court and High Court erred in refusing to hear claims; appeal allowed. Case remitted to Labour Court for hearing on merits.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu-perayu telah memfail beberapa tuntutan terhadap responden/majikan di Mahkamah Buruh, menuntut bayaran bagi kerja lebih masa, hari rehat dan cuti tahunan yang dikatakan kena dibayar kepada mereka di bawah peruntukan Bahagian XII Akta Pekerjaan 1955 ('Akta'). Walaupun tuntutan difailkan pada 6 Februari 1995, halperkara tersebut hanya didengar oleh mahkamah pada 10 Disember 1997. Sementara itu, pada 10 Oktober 1997, satu undang-undang subsidiari yang mengecualikan responden dari peruntukan Bahagian XII Akta, dan berkuatkuasa secara retrospektif ke 1 Oktober 1974 ('Perintah Pengecualian'), telah digazet oleh Menteri. Semasa pendengaran di hadapan Mahkamah Buruh, responden membangkitkan bantahan bahawa berdasarkan Perintah Pengecualian mahkamah adalah tidak berbidang kuasa untuk mendengar tuntutan. Mahkamah Buruh menerima bantahan responden dan kerana itu menolak tuntutan. Perayu-perayu merayu tetapi Mahkamah Tinggi mengesahkan perintah Mahkamah Buruh, sambil menambah, bahawa selagi ianya tidak diisytiharkan tak sah dan batal maka selagi itulah Perintah Pengecualian terpakai kepada tuntutan. Perayu-perayu merayu lagi dan persoalan penting yang berbangkit adalah sama ada tuntutan perayu-perayu di sini boleh ditumpas oleh Perintah Pengecualian mengambilkira antara lain prinsip-prinsip yang mengawal perundangan retrospektif serta maksud: (i) ss. 20 dan 30 Akta Tafsiran 1948 dan 1967 ('Akta Tafsiran'); dan (ii) ss. 7 dan 7A Akta.

Diputuskan:
Oleh Mokhtar Sidin HMR (menyampaikan penghakiman mahkamah)

[1] Satu undang-undang subsidiari retrospektif terpakai kepada hal-hal prosedur tetapi tidak kepada suatu hak. Suatu hak tidak boleh ditarik balik secara retrospektif kecuali Akta ibu ada membuat peruntukan bagi pembentukan undang-undang retrospektif tersebut sama ada secara jelas mahupun implikasi.

[2] Tuntutan perayu-perayu merupakan hak-hak yang terakru kepada mereka yang telah ditarik balik oleh Perintah Pengecualian. Adalah jelas bahawa, tanpa Perintah Pengecualian, perayu-perayu berhak kepada tuntutan tersebut sebagaimana yang diperuntukkan oleh Bahagian XII Akta. Dengan memfailkan tuntutan di Jabatan Buruh perayu-perayu telah memperkukuhkan hak-hak mereka. Dengan itu tiada merit atas hujah bahawa tuntutan-tuntutan tersebut bukan hak-hak yang dilindungi oleh undang-undang.

[3] Seseorang hanya berkuasa membuat undang-undang subsidiari jika Akta ibu memberinya kuasa untuk berbuat demikian. Untuk undang-undang subsidiari itu mempunyai kesan retrospektif Akta ibu harus pula memberikannya kuasa untuk membuat undang-undang subsidiari dengan kesan retrospektif. Kuasa ini tidak boleh diberi oleh s. 20 Akta Tafsiran sebagaimana yang dihujah oleh responden kerana Akta Tafsiran jelas tidak mempunyai kuasa untuk membuat undang-undang subsidiari dengan kesan retrospektif. Walaupun s. 20 tersebut telah dipinda, ianya tidak menukar sifat Akta Tafsiran itu. Ianya mengikut bahawa, dalam kes semasa, untuk memberikan kesan retrospektif kepada Perintah Pengecualian, Akta hendaklah membuat peruntukan baginya. Tiada apa-apa peruntukan sedemikian di dalam Akta.

[4] Berdasarkan s. 30 Akta Tafsiran, sesuatu hak yang telah diberi dan terakru tidak boleh ditarik balik melalui perundangan atau perundangan subsidiari dengan kesan retrospektif. Dalam kes semasa, perayu-perayu memperoleh hak-hak tersebut bila mereka memfail tuntutan yang berkenaan. Dalam lain perkataan, Perintah Pengecualian tidak wujud bila mereka memfail tuntutan mereka di Pejabat Buruh, Dungun dan kerana itu tuntutan tersebut menjadi hak-hak yang telah diberi dan terakru sekaligus dilindungi oleh s. 30 Akta Tafsiran. Akibatnya adalah, walaupun dengan kesan retrospektifnya, Perintah Pengecualian, yang mengecualikan responden dari peruntukan-peruntukan Bahagian XII, tidak mempunyai sebarang kesan terhadap tuntutan. Selain itu, s. 30(1) Akta Tafsiran memberikan perlindungan tambahan kepada prosiding undang-undang yang dikemukakan berhubung hak-hak ini. Tuntutan perayu-perayu, dengan itu, harus didengar oleh Mahkamah Buruh atas merit seolah-olah Perintah Pengecualian tidak pernah dibuat.

[5] Sementara terdapat merit dalam hujah perayu-perayu bahawa tuntutan mereka juga dilindungi oleh ss. 7 dan 7A Akta, tiada keperluan bagi mahkamah untuk membuat keputusan atas isu ini. Perlindungan yang diberi oleh s. 30 Akta Tafsiran, sebagaimana halnya, lebih dari mencukupi untuk melindungi tuntutan perayu-perayu.

Mahkamah Buruh dan Mahkamah Tinggi silap bila menolak untuk mendengar tuntutan. Rayuan dibenar; kes dihantar ke Mahkamah Buruh untuk didengar di atas merit.]

Case(s) referred to:

Kerajaan Malaysia v. Wong Pot Heng & Anor [1997] 2 CLJ 188 FC ***(refd)***
Lee Chow Meng v. PP [1978] 2 MLJ 36 ***(refd)***
Lim Phin Khian v. Kho Su Ming [1996] 1 CLJ 529 FC ***(foll)***
Maxwell v. Murphy [1965-1957] 96 CLR 261 ***(refd)***
National Land Finance Co-operative Society v. Director General of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***
The Colonial Sugar Refining Company, Limited v. Irving [1905] AC 369 ***(refd)***
Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 PC ***(refd)***
Wong Pot Heng & Anor v. Kerajaan Malaysia [1992] 3 CLJ 1497; [1992] 3 CLJ (Rep) 776 HC ***(refd)***
Yrttiaho v. Public Curator (Q) [1971] 125 CLR 228 ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 50(1), 66
Employment Act 1955, ss. 2B, 70
Interpretation Act 1948 and 1967, ss. 7A, 20, 30(1)(b), (d)

Compensation to Relatives Act 1897-1946 [NSW], s. 5
Compensation to Relatives (Amendment) 1953 [NSW], s. 2(a)

For the appellants - R Sivarasa (A Santhiago); M/s Daim & Gamany
For the respondent - Andrew Saw (Edward Saw); M/s Ng Yook Woon, Andrew TC Saw & Co

[Appeal from High Court, Kuala Terengganu; Civil Appeal No: 16-07-97]

Reported by WA Sharif

JUDGMENT

Mokhtar Sidin JCA:

The appellants in the present appeal were employed by the respondent in different capacities and belonged to a category of workers called "High Tech" employees. They were beneficiaries under a collective agreement first signed in 1996 by the respondent and KPPEPMI (the inhouse union of the employees). The appellants were members of the union which the Industrial Court had taken cognizance under that collective agreement and subsequent collective agreements. The respondent undertook several contract works with the Malaysian company known as Petroliam National Berhad (hereinafter referred to as "Petronas") outside the territorial seas of Malaysia in particular adjacent to the State of Terengganu. On 19 February 1995, the appellants filed their claims against the respondent with the Labour Department, Dungun claiming the following:

(a) Kerja pada hari cuti rehat mingguan	RM 5,017,246.50
(b) Cuti tahunan	171,434.08
(c) Gaji kerja lebih masa	6,977,883.18
(d) Perbezaan gaji kerja lebih masa	965,057.47
Jumlah	RM13,131,571.23

The appellants first lodged their claims with the Labour Department, Dungun on 6 February 1995. Apparently, this was not acted upon immediately by the department. It was only after 13 January 1997 (almost two years later) the department took steps to look into the complaints, after the solicitors for the appellants threatened to invoke the order of mandamus against the department and proceeded to act under s. 70 of the Employment Act, whereby on 21 April 1997 it issued a summons to the respondent and set a date to hear the complaints. Even though the hearing dates had been fixed several times but due to the request for adjournments by the parties, the complaints were finally heard on 10 December 1997.

In the meantime, the Minister for Human Resources promulgated the Employment (Exemption) Order 1997 which was gazetted on 29 September 1997. This was eventually replaced by the Employment (Exemption) (No. 2) Order 1997 (hereinafter referred to as "the Exemption Order") which was gazetted on 18 October 1997.

The Employment (Exemption)(No. 2) Order, 1997 provides:

> In exercise of the powers conferred by section 2B of the Employment Act 1955, the Minister makes the following order:
>
> 1. This order may be cited as the Employment (Exemption)(No. 2) Order 1997 and shall be deemed to have come into force on 1 October 1974.
>
> 2. Petroliam Nasional Berhad and any of its contractors and subcontractors of such contractors are exempted from the provisions of Part XII of the Act, in so far as they are engaged in the business or service relating to or connected with, whether directly or indirectly, the exploration, exploitation, winning and obtaining of petroleum.
>
> 3. This exemption applies in relation to the employees of Petroliam Nasional Berhad and its contractors and subcontractors of the contractors, whose place of work is within the territorial waters or the Exclusive Economic Zone or the Continental Shelf of Malaysia.
>
> 4. In the absence of any collective agreement and where the terms and conditions of service in the contract of service entered into by the contractors of Petroliam Nasional Berhad and the subcontractors of such contractors, with their respective employees, relating to the conditions of service provided in Part XII of the Act are, in the opinion of the Minister, unfavourable to the employees, the Minister may prescribe other terms and conditions of service for the employees.
>
> 5. The Employment (Exemption) Order 1997 is revoked.

As can be seen, although the Exemption Order was gazetted on 18 October 1997, it was to take effect retrospectively from 1 October 1974.

When the complaints were heard on 10 December 1997, the Exemption Order was already gazetted. The respondent, on the date of the hearing, raised the preliminary objection that the claims by the appellants came within the Exemption Order and as such the Labour Court had no jurisdiction to hear the claims by the appellants. The Labour Court upheld the objection and dismissed the claims by the appellants. On appeal to the High Court the appeal was dismissed. The appeal before us was in respect of the preliminary objection raised by the respondent. The Labour Court in its judgment stated:

> Setelah mendengar penghujahan daripada kedua-dua pihak adalah didapati bahawa kedua-dua pihak tidak mempertikaikan fakta yang defendan menjalankan kerja di bawah suatu kontrak dengan Petronas di Zon Ekonomi Eksklusif di luar pantai Negeri Terengganu. Manakala semua tuntutan pengadu yang berjumlah sebanyak RM13,131,571.23 merupakan tuntutan faedah yang ditetapkan di bawah peruntukan-peruntukan yang terkandung di dalam Bahagian XII Akta Kerja 1955.

Penghujahan pihak pengadu hanya tertumpu kepada kesahihan Perintah Kerja (Pengecualian) (No. 2) 1997 yang diperbuat di bawah Seksyen 2B, dalam Warta Kerajaan No. P.U.(A) 414 bertarikh 18.10.1997 dan seterusnya meminta Mahkamah Buruh mengistiharkan bahawa Perintah Kerja (Pengecualian) (No. 2) 1997 yang diperbuat di bawah Seksyen 2B Akta Kerja 1955 sebagai tidak sah (Null and Void) dan bercanggah dengan undang-undang (Unlawful).

Saya tidak dapat menimbang dan melayani kehendak pengadu kerana bidangkuasa Mahkamah Buruh hanya berupaya mendengar dan membuat keputusan dalam perkara-perkara yang ditetapkan di bawah peruntukan-peruntukan Seksyen 69 Akta Kerja, 1955 sahaja dan tidak lebih dari itu.

Saya berpuashati bahawa Defendan merupakan kontraktor kepada Petronas yang menggaji Pengadu untuk menjalankan kerja di bawah kontrak perkhidmatan di luar pantai Negeri Terengganu manakala semua tuntutan Pengadu berjumlah sebanyak RM13,131,571.23 pula merupakan tuntutan kepada faedah-faedah yang diperuntukkan di bawah Bahagian XII Akta Kerja, 1955. Berasaskan kepada Perintah Kerja (Pengecualian) (No. 2) 1997 yang diperbuat di bawah Seksyen 2B Akta Kerja 1955 dalam Warta Kerajaan No. P.U.(A) 414 bertarikh 18hb Oktober, 1997, jelas didapati bahawa Pengadu dan Defendan dikecualikan daripada pemakaian semua peruntukan-peruntukan yang terkandung di dalam Bahagian XII Akta Kerja 1955.

Maka dengan ini adalah diputuskan bahawa semua tuntutan pengadu berjumlah sebanyak RM13,131,571.23 terhadap Defendan dibuang (Dismissed).

The Labour Court was of the view that the Exemption Order covered the claims by the appellants. The Labour Court took the view that it has no jurisdiction to decide the legality of the Exemption Order. It was common ground between the parties that the claims by the appellants fall within Part XII of the Employment Act 1955 (hereinafter referred to as "the Act"). The Labour Court took the view that the Exemption Order was applicable to the claims by the appellants and dismissed the claims. The claims by the appellants were never decided on their merits.

On appeal to the High Court, the learned judge in his judgment stated at paras. 7 and 8:

> 7. For the purpose of this appeal, I rule that until such time as the impugned part of the legislation is declared void by court of competent jurisdiction, it has the force of law and binding on the parties.
>
> 8. In the premise, for purpose of inquiry under s.69 Employment Act 1955, I hold that the labour officer has no jurisdiction to hear the claim. In the result, the appeal is dismissed with cost.

The learned judge took the view that the Labour Court had no jurisdiction to hear the claims by the appellants because the Exemption Order had not been declared null and void, and until it has been declared null and void, the Exemption Order would be applicable to the claims by the appellants. The respondent raised the issue that the Labour Court had no jurisdiction to hear the claims by the appellants on the ground that the Exemption Order applies to the claims by the appellants. The appellants resisted the objection stating that the Exemption Order was not valid against the claims. In the High Court, the same issue was raised but instead of deciding that issue the High Court decided that since the Exemption Order was not declared null and void, the Labour Court had no power to hear the claims by the appellants. Being dissatisfied with that decision the appellants appealed to this court.

As stated earlier, the appellants' claims were in respect of overtime, rest day and annual leave payments for the years 1989 to 1994 due to them under the provisions of the Act. It was not disputed that the first collective agreement between the respondent and the appellants' union was signed in 1996 and this was renewed from time to time. The collective agreement also covered the claims by the appellants. It was also not disputed that the appellants filed their claims with the Labour Department, Dungun on 6 February 1995, that was before the Exemption Order was gazetted in the Government Gazette No. P.U.(A) 414 dated 18 October 1997. The Exemption Order was to take effect from 1 October 1974 which effectively exempt the respondent from paying the appellants' claims because the claims fall within Part XII of the Act. It is clear to us that without the Exemption Order the respondent is obliged to pay the claims if they are proven. The appellants were unfortunate not to have their claims heard and disposed of before the Exemption Order was gazetted. As can be seen, the Exemption Order was gazetted about two and a half years after the appellants filed their claims.

The issue raised before us was whether the claims by the appellants would be defeated by the Exemption Order which has retrospective effect. The learned counsel for the appellants submitted that he is not challenging the power of the Minister to make the Exemption Order which the Minister has under s. 2B of the Act or seeking to declare the Exemption Order is null and void, but he is seeking an order that the Exemption Order could not deprive the appellants of their claims or that the Exemption Order is invalid against the claims by the appellants. The appellants' counsel conceded that under s.2B of the Act, the Minister has the power to make the Exemption Order and in appropriate cases to have the order made with retrospective effect. It was the contention of the appellants that the Exemption Order has no effect on the claims by the appellants because the claims are rights which had already accrued when the Exemption Order was made.

On the other hand, it was the contention of the respondent that the only way the appellants could have their claims heard by the Labour Court was to challenge the Exemption Order itself and have it declared null and void. This could only be done by making a separate application in the High Court and not in the Labour Court

The appellants' counsel raised the issue that though the Minister is empowered by s. 2B of the Act to make the Exemption Order, there is no provision in the Act empowering the Minister to have the Order be made retrospectively. The learned counsel conceded that s. 20 of the Interpretation Acts provides the power to the relevant authority to make subsidiary legislation with retrospective effect, it is meaningless unless the parent Act itself provides for the Minister to make subsidiary legislation with retrospective effect. This has been decided by a string of authorities. It is more so if the retrospective effect of the subsidiary legislation affects the right of a person.

Before proceeding further, we would like to refer to the two provisions referred to by the parties. The first is the empowering provision in the Act for the Minister to make the Exemption Order which is s. 2B of the Act:

> 2B. General power to exempt or exclude.
>
> The Minister may by order exempt or exclude, subject to such conditions as he may deem fit to impose, any person or class of persons from all or any of the provisions of this Act.

Secondly, as contended by the respondent, the Minister is empowered to make subsidiary legislation with retrospective effect by s. 20 of the Interpretation Acts. The relevant provision provides:

> 20. Subsidiary legislation may be retrospective.
>
> Notwithstanding the absence of any express provision in any Act or other written law, where such Act or other written law empowers any person to make subsidiary legislation, such subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made:

We shall now refer to the various authorities. In *National Land Finance Cooperative Society v. Director General of Inland Revenue* [1993] 4 CLJ 339 where at p. 344, Gunn Chit Tuan, CJ Malaya (as he then was) said:

On the retrospective operation of Acts, the presumption is that an enactment is not intended to have a retrospective operation unless a contrary intention appears. In this case, that presumption has been rebutted because s. 1(5) of the Amendment Act states in clear terms that the amendment was intended to be retrospective. But a retrospective operation should not be given to a statute to impair an existing right and it has been stated by the UK Court of Appeal in *EWP Ltd v. Moore* at p. 891:

> ... that those who have arranged their affairs, as the saying is, in reliance on a decision of these courts which has stood for many years should not find that their plans have been retrospectively upset ...

Moreover, one should avoid a construction that inflicts a detriment and as Lord Brightman has said in *Yew Bon Tew v. Kenderaan Bas Mara* [1982] 3 All ER 833:

> A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.

In this case it is clear that the taxpayer had an acquired right to exemption from tax under the Ordinance, when the Act came into force on 20 September 1967. That acquired right which was confirmed by the Special Commissioners of Income Tax in case No. PKR 256 should only be overruled prospectively and not retrospectively. Admittedly, the legislature had made its intention clear in s. 1(5) of the Amendment Act that s. 16 therein which amended Sch 9 of the Act shall be deemed to have effect for the year of assessment 1968 and subsequent years of assessment. But the Amendment Act did not also expressly provide that Pt. I of the Interpretation Acts 1948 and 1967 which includes the said s. 30 of that Act shall not apply. Therefore, following the decision of Viscount Dilhorne, Lord Diplock and Lord Edmund-Davies in the House of Lords case of *Floor v. Davis (Inspector of Taxes)*, the provisions of the Act must be construed having regard to the Interpretation Acts 1948 and 1967. There is therefore a doubt whether the legislature had intended to impair the existing right of the taxpayer and inflict a detriment to it as it takes away a vested right under the existing law to exemption from tax. As there is a doubt, the ambiguity must be construed in favour of the taxpayer as the said exemption from tax has not been removed by sufficiently clear words to achieve that purpose. We therefore allowed the appeal …

The retrospective effect of an amending law was discussed at great length in *Lim Phin Khian v. Kho Su Ming* [1996] 1 CLJ 529. In that case the respondent raised a preliminary objection as to the competency of the appellant's appeal in the Federal Court. The appellant filed his notice of appeal on the date when the Court of Appeal was created. With the creation of the Court of Appeal,

any appeal (except in cases where the law provides otherwise) from the High Court shall be to the Court of Appeal. The notice of appeal was filed by the appellant in the Federal Court. It was contended by the respondent that the appeal did not lie to the Federal Court but should be in the Court of Appeal because when the notice of appeal was filed, the Court of Appeal had been created. Edgar Joseph Jr., FCJ (as he then was) at pp. 536-541 stated:

> In answer to the preliminary objection, counsel for the appellant contended that the right of appeal is a matter of substance and not a mere matter of practice and procedure, and that such a right accrues to the litigant and vests in him as from the date of commencement of the action or lis, and although it may be actually exercised when the judgment appealed against is pronounced, such right is to be determined having regard to the law applicable at the date of the institution of the action or lis and not by the law applicable at the date of the decision or the date of filing of the appeal. It was further submitted that this vested right of appeal could only be taken away or transferred to a new tribunal by subsequent legislation if it so provides expressly or by necessary intendment but not otherwise.
>
> In the *Colonial Sugar Refining Co* case, an application had been made by the respondent that the appeal from the judgment of the Supreme Court of Queensland be dismissed on the ground that the right of appeal to His Majesty in Council given by the order in council dated 30 June 1860, under which the leave was granted, had been taken away by s. 39 of the Australian Commonwealth Judiciary Act 1903, and that the only appeal from a decision of the Supreme Court of Queensland thereafter lay to the High Court of Australia.
>
> The writ in the action in which the appeal was brought had been issued on 25 October 1902. The case was set down for argument in July 1903, but it was stood over to the September sitting of the court. In the meanwhile, the Australian Commonwealth Judiciary Act 1903, had come into force, it having received the royal assent on 25 August 1903. On 4 September 1903, the court delivered the judgment appealed from. Thereafter, leave to appeal, pursuant to the order in council dated 30 June 1860, was given by the Supreme Court of Queensland. In dismissing the respondent's objection as to the competency of the appeal, Lord Macnaghten speaking for their Lordships of the Board said this:
>
> > As regards the general principles applicable to the case, there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well-founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled

> to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And, therefore, the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

If I were free to decide the preliminary objection on general principle, I would unhesitatingly hold that the principles enunciated in the *Colonial Sugar Refining Co* case would apply – although the effect of doing so would mean that many decisions of the Court of Appeal in appeals arising from suits or proceedings instituted in the court of first instance prior to 24 June 1994, would thereby be nullified, and the Court of Appeal would be bereft of business for a while – and, on that ground alone, the preliminary objection would have to be overruled.

However, the problem which faces the appellant is that by s. 17 of the Courts of Judicature (Amendment) Act 1995 (Act A909) ('the Amending Act of 1995') (which was overlooked all round) it is provided as follows:

> *Any proceeding* which is *pending* before the *Supreme Court on the 23rd June 1994 shall be continued or proceeded with*, as the case may be, before *the Federal Court* and for this purpose the Federal Court shall have and exercise all the powers of the Supreme Court prior to the 24th June 1994. (emphasis added).

I hasten to add that although the Amending Act of 1995 came into force on 17 February 1995, it was given retrospective effect by s. 1 thereof, which provides that it 'shall be deemed to have come into force on 24 June 1994', – a point of considerable significance in the context of the present case and to which I shall return later.

...

It is a well known canon of construction that the intention of a saving provision is to narrow the effect of the enactment in which it is found so as to preserve some existing legal rule or right, as the case may be, from its operation. It, therefore, differs from a proviso which is generally concerned with limiting the new provision made by the section to which it is attached. The cases of *Alton Woods* [1600] 1 Co Rep 40 b; *Arnold v. Gravesend Corp*

[1856] 2 K & J 574 at p 591; *Butcher v. Henderson* [1868] LR 3 QB 335, show that a saving is taken not to be intended to confer any right which did not exist already.

...

However, I consider that the provisions of s. 17 of the Amending Act of 1995, would appear to be that the material date for determining whether it is the Court of Appeal or the Federal Court which is to have jurisdiction to hear and determine a particular appeal from judgments, orders or decisions of the High Court, is 23 June 1994 – the eve of the date of the creation of the Court of Appeal – so that if on that date there is already an appeal pending in the Supreme Court (now the Federal Court) it shall be that court (now the Federal Court) which shall be invested with the jurisdiction to hear and determine the same. But, if on that date – 23 June 1994 – a particular appeal was not pending in the Supreme Court, then does it follow that, notwithstanding the fact that the suit or proceeding which led up to the appeal was instituted before that date, in all such cases the court invested with the jurisdiction to hear the appeal from a judgment, order or decision of the High Court is the Court of Appeal and not the Federal Court?

If that be the true effect of s. 17 of the Amending Act of 1995, then having regard to the chronology of events relevant to the preliminary objection hereinbefore stated, as there was no appeal pending in the Supreme Court as on 23 June 1994, the eve of the date of the creation of the Court of Appeal – I would have no option but to uphold the preliminary objection and strike out the appeal as being incompetent. But, reflection reveals that there are difficulties in the way of accepting this view as a solution to the problem.

It is pertinent to point out that the Amending Act of 1995 had received the royal assent on 7 February 1995, and was published in the Gazette on 16 February 1995, so that ordinarily it would have come into operation on 17 February 1995, (see s. 19(2) of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) ('the Interpretation Act').

However, as I have said, by s. 1 of the Amending Act of 1995, it is provided that the amendments made by it 'shall be deemed to have come into force on 24 June of 1994'.

Clearly, therefore, the Amending Act of 1995 has retrospective effect.

Be that as it may, when the solicitors for the appellant filed and served their notice of appeal on 24 June 1994, and thereby asserted their client's right of appeal, they, not being gifted with prescience, could not possibly have foreseen that some eight months later they would be confronted by the jurisdictional objection hereinbefore mentioned. In other words, when on 24 June 1994, the solicitors for the appellant brought their appeal to the Federal Court, they had not the slightest reason to suppose that their appeal had to lie to the Court

of Appeal, for the very good reason that on that date, the provisions of s. 17 of the Amending Act of 1995 were unknown to the law and so they had no option but to rely on the general principles of the common law, reinforced by s. 30(1)(d) and (e) of the Interpretation Act, as illustrated by the *Colonial Sugar Refining Co* case, and to file their appeal to the Federal Court.

In these circumstances, to uphold the preliminary objection, would lead to a manifest injustice and would serve no purpose, so that, if at all possible, this court should be astute to avoid such a result unless, of course, this is what the Amending Act of 1995 plainly requires, in which case, the function of the court is to give effect to the will of Parliament as expressed in the law.

...

To assist in the determination of the question of critical substance, it will be useful by way of background, to take a hard look at the common law rules regulating the interpretation of amending statutes. I find that these have been admirably enunciated by Dixon CJ in *Maxwell v. Murphy* [1957] 96 CLR 261 at p. 267:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Hellish LJ in *Republic of Costa Rica v. Erlanger* [1876] 3 Ch D 62 at p 69. 'No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done'.

The learned Chief Justice went on to say at p. 270 that perhaps there could be no more practical summary of the principle which emerges from the cases than the following statement by a Canadian judge (Sloan JA) in *Dixie v. Royal Columbian Hospital* [1941] 2 DLR 138 at pp. 139 and p. 140:

> ... Unless the language used plainly manifests in express terms or by clear implication a contrary intention:
>
> (a) a statute divesting vested rights is to be construed as prospective;
>
> (b) a statute, merely procedural, is to be construed as retrospective; and
>
> (c) a statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.

The general rules of the common law aforesaid have been reinforced by s. 30(1)(b) and (d) of the Interpretation Act, which, omitting immaterial parts, provides that, 'The repeal of a written law in whole or in part shall not … (b) affect any right ... accrued … under the repealed law; … (d) affect any … legal proceeding or remedy in respect of any such right …', unless, as qualified in its application by s. 2(3), there is 'express provision to the contrary' or 'something in the subject or context inconsistent with or repugnant to its application'.

In *Smith v. Thiess Peabody Coal Pty Ltd* [1965] QWN 38 at p. 47, Gibb J (later CJ) dealing with s. 20(1)(e) of the Interpretation Acts 1954 to 1962 (Q) (equivalent to s. 30(1)(d) of our Interpretation Act), said this:

> That all para (e) is intended to do is to preserve the availability of investigations, legal proceedings and remedies in respect of accrued rights, and not to preserve the procedure to be followed in the course of such legal proceedings.

And, in *Yrttiaho v. Public Curator (Q)* [1971] 125 CLR 228 at p. 245, the same learned judge dealing with the same statutory provision said this:

> Plainly enough, para (e) and the words which follows it require that, unless the contrary intention appears, an amending enactment shall be construed so that, notwithstanding the amendment, proceedings pending thereunder at the time of the amendment can be continued, and proceedings can be initiated after the amendment in respect of substantive right acquired before the amendment took effect'.

In *Lee Chow Meng v. Public Prosecutor* [1978] 2 MLJ 36, the appellant had been convicted and sentenced by the President of the Sessions Court With Special Powers. He appealed to the High Court whereby his appeal to the High Court was dismissed. The case was then referred by the High Court to the Federal Court on a question of public interest which had arisen in that appeal. By the time the reference came before the Federal Court, ss. 50(1) and 66 of the Courts of Judicature Act 1964, had been amended so as to take away the power of the High Court to make a reference in respect of the decision of a President of the Sessions Court With Special Powers. The Federal Court

therefore refused to consider the reference. The appellant then appealed to the Federal Court, leave having been given to him to file his record of appeal out of time. Suffian LP (as he then was), delivering the judgment of the court, stated at p. 37:

> A statute dealing with procedure has retrospective effect, that is, it applies to proceedings begun before and after the commencement of the statute, unless a contrary intention is expressed or clearly implied. This was so stated by Lord Blackburn in *Gardner v. Lucas*:
>
> > ... it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.
>
> On the other hand a statute dealing with rights has effect only for the future and is not to be construed retrospectively, it does not apply to proceedings begun before its commencement, it only affects proceedings begun after that, unless there is a clear indication to the contrary. This was so stated by Jessel M.R. in *Re Joseph Suche & Co Ltd* in the following words:
>
> > It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them.

In *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; ([1983] CLJ (Rep) 56), the Privy Council held that an accrued right to plead time bar, which was after the lapse of the statutory period, is in every sense a right even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. In that case the respondents acquired a right when the period prescribed by the 1948 Ordinance expired and that right could not be taken away by the 1974 Amending Act. At p. 14 (pp. 62-64), Lord Brightman said:

> Their Lordships consider that the proper approach to the construction of the 1974 Act is not to decide what label to apply to it, procedural or otherwise but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations. The appellants assert that a Limitation Act does not impair existing rights because the cause of action remains, on the basis that all that is affected is the remedy. There is logic in the distinction on the particular facts of "*The Ydun*" case, because the right to sue remained, for a while, totally unimpaired. But in most cases the loss, as distinct from curtailment, of the right to sue is equivalent to the

loss of the cause of action. The Public Authorities Protection Act can be regarded as procedural on the facts of *"The Ydun"* case, but a slight alteration to those facts would have made it substantive. A limitation act may therefore be procedural in the context of one set of facts, but substantive in the context of a different set of facts.

In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable Their Lordships see no compelling reason for concluding that the respondents acquired no "right" when the period prescribed by the 1948 Ordinance and the 1974 Act are procedural in character. The plain purpose of the 1974 Act, read with the 1948 Ordinance, was to give and to deprive; it was to give to a potential defendant, who was not on June 13, 1974 possessed of an accrued limitation defence, a right to plead such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence which he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he had been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

Lastly, their Lordships refer to *Mitchell v. Harris Engineering Co Ltd.* The appellants relied on this case in support of the submission that the 1948 Ordinance had conferred no "right" on the respondents. This was a case of mistaken identity, similar to *Rodriguez v. Parker (supra)* and was decided in the same way. The plaintiff had suffered an accident on 27 August 1963, for which he claimed damages from his employer. On 9 August 1966 he issued a writ. On 27 August, the three-year period expired. There were in fact two companies, with almost identical names. One was an Irish company (Harris Engineering Company Ltd), and the other was an English company (Harris Engineering Company (Leeds) Ltd). The Irish company, which was the employer, carried on business from an address which was also the registered office of the English company. So the opportunity for confusion was manifest. By mistake, the defendant named in the writ was the English company. When the mistake was discovered, which was after the three years had elapsed, the plaintiff sought to amend the proceedings by substituting the name of the Irish company for the name of the English company pursuant to Rules of the Supreme Court, O. 20 r. 5, which gave the court power in a case of mistaken identity to substitute a new defendant for the defendant originally sued, notwithstanding that a relevant period of limitation had expired. It was submitted on behalf of the employer that the rule was *ultra vires* because if enabled the court to divest a defendant of an accrued right. The argument failed, rightly in their Lordships' view.

Lord Denning MR (at p. 718) said that:

> Whenever a writ has been issued within the permitted time, but is found to be defective, the defendant has no right to have it remain defective;

while Russell LJ put the matter thus (at p. 720):

> It was argued that before the amendment, the Irish company had a sure shield under the statute and the amendment removed that shield. But its sure shield under the statute was one which was available to it in another action should one be brought out of time. Its shield in the present proceedings was not the statute, but the fact that it was not yet a defendant in them. That shield could be taken away by the procedural power of permitting amendment of these proceedings.

Their Lordships consider that there is an alternative, and perhaps preferable, approach to the *Mitchell* type of case. Not only did the two companies have a common English address, but they also had common directors and a common secretary. It was obvious to all who were concerned on behalf of the two companies that the plaintiff intended to sue his employer and that those advising the plaintiff believed that the name of his employer was correctly written as Harris Engineering Company (Leeds) Ltd. It was fortuitous that a company bearing the latter name actually existed. Had there been no such company in existence, the plaintiff's right to correct the name of the defendant would have been beyond argument. No one was milled by the use of the mistaken name in the proceedings, and the case resolves itself into one of mere misnomer which was clearly within the court's corrective power under O. 20 r. 5: see *Whittam v. W.J. Daniel & Co Ltd.* So analysed the result of the *Mitchell* case is in no way inconsistent with the view which their Lordships take in the present case. The only other comment which their Lordships would make on the decision in the *Mitchell* case is that they do not accept the generality of the proposition stated by the learned Master of the Rolls that:

> The Statute of Limitations does not confer any right on the defendant. It only imposes a time limit on the plaintiff.

In the opinion of their Lordships an accrued entitlement on the part of a person to plead the lapse of a limitation period as an answer to the future institution of proceedings is just as much a "right" as any other statutory or contractual protection against a future suit.

In *The Colonial Sugar Refining Company, Limited v. Irving* [1905] AC 369, at p. 372 Lord Macnaghten, delivering the judgment of the court, said:

> As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in

> existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

In *Maxwell v. Murphy* [1956-1957] 96 CLR 261, an action by the appellant on behalf of herself and her two children against the respondent whereby the appellant claimed damages for the sum of £10,000. The appellant alleged the respondent so negligently, unskillfully and carelessly drove a motorcar on a public highway, knocked into the appellant's husband who happened to be on the highway. As a result of that the appellant's husband was injured and died on 19 March 1951. The writ was issued on 30 November 1954. The defendant demurred to the declaration on the grounds: (1) that the suit was barred by the Compensation to Relatives Act 1897-1946 (NSW) not having been instituted within twelve months from the date of the death of Stuart Edward Maxwell; and (2) that the amendments of the Compensation to Relatives Act by s. 2(a) No. 33 of 1953 was not retrospective in its operation. At the date of the death of Stuart Edward Maxwell, which occurred prior to the amendment, s. 5 of the Compensation to Relatives Act 1897-1946 provided that not more than one action shall lie for and in respect of the same subject matter of complaint and every action shall be commenced within twelve months after the date of the death of such deceased person. In December 1953, the Compensation to Relatives (Amendment) Act 1953 (No. 33 of 1953) was passed, and by s. 2(a) provided that the words "twelve months" were omitted from s. 5 of the principal Act and the words "six years" were inserted. Dixon CJ (at p. 267) said:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption.

Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Mellish LJ in *Republic of Costa Rica v. Erlanger*. "No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done".

The distinction is clear enough in principle and its foundation in justice is apparent. But difficulties have always attended its application. In some cases they have been due to the discovery in the nature or context of the legislation or in its subject matter of indications, whether faint and conjectural or strong and persuasive, of a desire to cover situations already existing. In other cases the difficulty has been traceable to the inveterate tendency of English law to regard some matters as evidentiary or procedural which in reality must operate to impair or destroy rights in substance. Again, enactments in truth conferring or denying rights are not seldom expressed in terms of remedy. There is a tacit recognition of this in the manner in which Lord Penzance (then Wilde B) stated the rule in a passage that has been much quoted – "the rule applicable to cases of this sort is that, when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act" – *Wright v. Hale* [1860] 6 H & N 227 at p. 232. [158 ER 94 at p. 96.

The rule or rules governing the presumption against the operation of new laws upon rights that have already accrued or immunities that have already been established or acquired must be reconciled or accommodated with the rule that the repeal of a provision makes it as if it had never been enacted. It is to this that the exceptions, already described, of the former rule are directed. In the case cited above, *Butcher v. Henderson* [1868] LR 3 QB 335, this is clearly put by Blackburn J as follows: "The maxim alike of law and justice is, *'Nova constitutio futuris formam imponere debet, non praeteritis,'* and therefore, though when a statute is repealed, it is as to new matters as though it had never existed, yet as to transactions already completed under it, it still has full effect.

From the authorities above-stated, it is clear to us that a subsidiary legislation with retrospective effect would be applicable to procedural matter and not to a right. As such to consider whether a subsidiary legislation with retrospective effect is void or otherwise, a distinction should be made whether that subsidiary legislation affects a procedural matter or a right. If it affects a procedural matter then it would be effective on the date appointed but then a procedural

matter could become a right as illustrated in the authorities above and once it becomes a right it could not be taken away retrospectively. There is an exception to this rule in that where the parent Act by express provision or by implication provides for the making of the subsidiary legislation with retrospective effect as stated in *Kerajaan Malaysia v. Wong Pot Heng & Anor*. The High Court decision was reported in [1992] 3 CLJ 1497; [1992] 3 CLJ (Rep) 776, while the Federal Court decision was reported in [1997] 2 CLJ 188. In view of the importance of that decision in its application to the present appeal, I would refer to both the decisions of the High Court and the Federal Court.

In the High Court, Eusoff Chin J (as he then was) stated:

> As regards the power of the Yang di-Pertuan Agong to legislate regs. 9B and 13(2) with retrospective effect, I need to look at the words used in s. 2 of the 1979 Act, and the provisions in the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) ('the Interpretation Acts'). Section 20 of this Act states:
>
> > Subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made:
> >
> > Provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published
>
> It is obvious that generally, a subsidiary legislation which is defined in the Interpretation Acts to include a regulation, or an amendment thereto, can be made to operate retrospectively provided that the subsidiary legislation or the amendment does not affect any right, privilege, obligation or liability already acquired, accrued, or incurred under any law.
>
> The word 'written law' is defined by the Interpretation Acts to include 'Acts of Parliament and subsidiary legislation made thereunder'. Section 30 of the Interpretation Acts states:
>
> (1) The repeal of a written law in whole or in part shall not:
>
> (a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or
>
> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; …

Part I of the Interpretation Acts applies to the interpretation of the 1979 Act because s. 2 of the Interpretation Acts says so. But s. 2(3) of the Interpretation Acts states:

> Part I shall not apply where there is
>
> (a) express provision to the contrary; or
>
> (b) something in the subject or context inconsistent with or repugnant to its application.

Section 2(3) of the Interpretation Acts, therefore, clearly states that the provisions in Pt I of this Act shall be applied only if there is no provision to the contrary, contained in the 1979 Act. Both ss. 20 and 30 of the Interpretation Acts are in Pt I of the Act.

Section 2(1) of the 1979 Act which confers power on the Yang di-Pertuan Agong to make emergency regulations, begins with the words 'Subject to the provisions of this section'. This clearly shows that the powers conferred on the Yang di-Pertuan Agong to make essential regulations are limited and confined only to the provisions contained in s. 2. These words impose conditions and restrictions on the powers of the Yang di-Pertuan Agong when making the essential regulations. Therefore, whenever the Yang di-Pertuan Agong makes an essential regulation in the exercise of the powers conferred on him by the 1979 Act, he must not act outside the powers so conferred on him by that section.

In my view, the words 'subject to the provisions of this section' shows Parliament's intention that, while conferring overwhelming powers on the Yang di-Pertuan Agong by ss. 2(3) and (4) to make emergency regulations, the powers must be exercised within the confine of this section only. He must not go outside the scope of this section when exercising his powers to make emergency regulations. If, therefore, s. 2 of the 1979 Act, does not confer on him the power to make emergency regulations with retrospective operation, he is prohibited by law from making emergency regulations with retrospective effect.

A close scrutiny of s. 2 of the 1979 Act shows that this section does not confer power on the Yang di-Pertuan Agong to make an emergency regulation with retrospective effect. The question is whether the provision of s. 20 of the Interpretation Acts can apply to give the Yang di-Pertuan Agong power to make emergency regulations having retrospective effect. For the reasons I have just stated, the answer is that s. 20 of the Interpretation Acts does not apply to emergency regulations made by the Yang di-Pertuan Agong in exercise of the powers conferred on him by s. 2 of the 1979 Act. I would only agree that the general power to make regulations with retrospective effect given by s. 20 of the Interpretation Acts, would apply to emergency regulations made by the Yang di-Pertuan Agong, if the limitation phrase 'subject to the

provisions of this section' is not there in s. 2 of the 1979 Act. Therefore, to enable the Yang di-Pertuan Agong to make these essential regulations with retrospective effect, he must first be expressly conferred with such powers by s. 2 of the 1979 Act itself.

At the risk of repeating myself, my finding is that Parliament can always legislate retrospectively unless there is any prohibition under the Federal Constitution. By the provisions of s. 20 (but subject to s. 30) of the Interpretation Acts, a person or body, on whom an Act of Parliament confers powers to make subsidiary legislation, may also generally make subsidiary legislation with retrospective effect. But where the provisions of s. 20 of the Interpretation Acts has been excluded, such as has happened here, the power to make subsidiary legislation with retrospective effect must be given expressly to the person or body by the section conferring power on the person or body in clear and unambiguous words.

In *Dr Indramani Pyarelat Gupta v. WR Nathu and Ors* the Supreme Court of India held:

> … If the conferment of power to make delegated legislation *proprio vigore* carried with it to make a rule or byelaw with retrospective operation, it may become an instrument of oppression. In these circumstances, it has been rightly held that the provision conferring such a power must be strictly construed and unless a statute expressly confers a power to make a rule or byelaw retrospectively, it must be held that it has not conferred any such power. *It is said that such a strict construction may prevent a rule-making authority from making a rule in an emergency, though the occasion demands or justifies a rule with retrospective effect. The simple answer to this alleged difficulty is that if the legislature contemplates or visualizes such emergencies, calling for the making of such rules or byelaws with retrospective effect, it should expressly confer such power. It is also said that the government can be relied upon to make such rules only on appropriate occasions. This court cannot recognize implied powers pregnant with potentialities for mischief on such assumptions. That apart, the scope or ambit of a rule cannot be made to depend upon the status of a functionary entrusted with a rule-making power. In public interest the least the court can do is to construe provisions conferring such a power strictly and to confine its scope to that clearly expressed therein.* (emphasis added).

The amending Regulations made on 26 July 1991 clearly state that both the new regs 9B and 13(I) are to take effect retrospectively to the commencement date of the Regulations which is 23 July 1986. The word 'retrospective' means looking backwards or survey of the past. A retrospective legislation contemplates the past and gives to a previous transaction some different legal

effect from that which it had under the law when it occurred. Every legislation which takes away or impairs a vested right acquired under existing law, or creates a new obligation, imposes a new duty or attaches a new disability in respect of a transaction or consideration already past, must be deemed to be prospective. If a written law provides that as, at a past date, the law shall be taken to have been that which it was not, that law is deemed to be retrospective even though that law does not expressly say that it is to commence from a date in the past. Retrospective is artificial, deeming a thing to be what it was not.

Willes J in *Phillips v. Eyre* at p. 23 said:

> Retrospective laws are, no doubt, prima facie or questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law … Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessarily implication it appears that such was the intention of the legislature.

I would therefore hold that s. 20 of the Interpretation Acts does not apply to emergency regulations made under s. 2 of the 1979 Act. Since s. 2 of the 1979 Act itself does not contain any provision empowering the Yang di Pertuan Agong to make emergency regulations with retrospective effect, I hold that both the new regs. 9B and 13(2) inserted into the Regulations by the amending Regulations are invalid in so far as it purports to operate retrospectively.

In the Federal Court, Peh Swee Chin FJ (as he then was) at pp. 197-204 stated:

On reference by any citizen who is aggrieved by any subsidiary or delegated or subordinate legislation, his Lordship referred to the 'threefold task' stated by Lord Diplock in *McEldowney v. Forde* [1971] AC 632 at p. 658 in approaching such a reference, ie:

> Where the validity subordinate legislation made pursuant to powers delegated by an Act of Parliament to a subordinate authority is challenged, the court has a threefold task: first, to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorized to make, secondly, to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description.

After considering all the submissions, his Lordship came to the finding as stated above.

Let us look at the 'threefold task' in connection with the parent Act and the regulations of 1991 below.

Looking at the parent Act, as the first part of such a threefold task, we find that the parent Act was enacted to deal with certain grave and sudden situations requiring immediate actions or solutions. In view of the brevity of the parent Act, consisting of only six pages in contemplation of such a variety of grave situations aforesaid, the parent Act in our view, is deemed to confer, large and comprehensible powers to the Yang di-Pertuan Agong, who is undoubtedly the most prestigious delegated authority for making any subordinate, or delegated or subsidiary legislation, the three separate words of 'subordinate', 'delegated' and 'subsidiary' incidentally all mean the same thing, all begin attributive to 'legislation'. The relevant part of s. 2 of the parent Act is para (j) of sub-s. 2 thereof as set out above, the other paragraphs referring to other specific matters not relevant to the instant appeal. About the second part of the said threefold task, the function of the Regulations of 1991 is clear, they were made with hindsight to effect necessary changes in details to adapt them to earlier unforeseen contingencies in experience rapidly gained so far; see Prof Jain's *Administration Law of Malaysia and Singapore* (2nd edn, 1989) at p. 38 about factors leading to the growth of subsidiary legislation. Such function aforesaid, suffice it to say, is one of the normal functions of subsidiary legislation. Regulations 9B and 13(2) inserted by the Regulations of 1991 were enacted to fulfill this function.

The last part of the threefold task is of course the controversy in this case as to whether regs. 9B and 13(2) comply with s. 2 of the parent Act, ie whether they are within the scope of the section, and if they are not, they are *ultra vires* the said s. 2. For this, some discussion is necessary about the pros and cons that follow before one draws a conclusion.

Any subsidiary legislation is in effect a transfer of power from Parliament to some other authority, eg from the administration with the executive authority of Malaysia vested in the Cabinet, down to any local authority. In order to protect the authority, dignity and standing of Parliament and at the same time, the man in the street, safeguards for such subsidiary legislation are essential and courts are part of such safeguards.

Parliament has plenary powers to make laws including retrospective law. If any authority is required at all for the proposition, see *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187. This is, of course, subject to any express restriction in the Federal Constitution.

Now s. 2(2)(j) of the parent Act has given the said delegated authority the power of 'amending any written law', for suspending the operation of any written law, or for 'applying any written law with or without modification'; see the said para (j) set out above. By making the operation of regs. 9B and 13(2) inserted by the Regulations of 1991 retrospective to 23 July 1986, it

may seem very much to be an act of 'amending any written law … ' Coupled with this, it has been urged both here and below that s. 20 of the Interpretation Acts provided support for the validity of the regulations in question. The said s. 20 is set out below:

> Subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made:
>
> Provided that no person shall be made or shall become liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published.

His Lordship has held in the court below that the said s. 20 would be irrelevant in the absence of such express power to the delegated authority to legislate retrospectively.

This s. 20 is crucial but more will be said about this later, as we discuss further other relevant aspects or the pros and cons of the matter.

Thus, concern for some material aspect of the retrospective law was expressed archetypally by Willes J in *Phillips v. Eyre* [1870] LR 6 QB 1 at p. 23:

> Retrospective laws are, no doubt, *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.

Such concern stated above, though in different wording and phraseology, including the description of delegated authority functioning in effect as or like a mini Parliament, runs through the cases in relation to the presumption against retrospective operation of any statute in the absence of any express contrary intention. It is unnecessary to cite a multitude of such cases which are not directly on the point in question here apart from expressing such similar concern which must be borne in mind while one considers the absence of express power to a delegated authority to legislate retrospectively.

Now s. 2 of the parent Act has not expressly conferred power on the delegated authority to make the regulations in question, but one begins to wonder whether the same s. 2 has, by necessary implication, conferred such power because of the shortness of the parent Act, the said para (j) saying about amending 'any law', and the grave and sudden situations occasioning such parent Act in the first place. More about this later.

An overview in Malaysia on such a point can be found in *Administrative Law of Malaysia and Singapore* by Prof MP Jain (2nd edn, 1989) at p. 93 as follows:

> The courts do at times imply certain restrictions on the general power to make subsidiary legislation. One such implied restriction is that regulations should not have retrospective effect unless the parent Act expressly or by necessary implication confers a power to that effect. Parliament can enact laws with retrospective effect, but a subordinate legislator has to act within the limits of the power delegated to him, and a mere general power to make regulations does not empower him to make regulations with retrospective effect. The reason for this rule is that retrospective legislation disturbs vested rights of the people, and this only the legislature should do.

Such similar overview in Britain can also be found in *44 Halsbury's Laws* (4th edn) at p. 636, para. 1004 in connection with interpretation of subsidiary legislation as set out below:

> Other matters affecting operation. Since, if validly made, subordinate legislation has the same force and effect as a statute, little remains to be said with respect to its operation. However, it may be mentioned that, whereas the question whether it is intended to have retrospective effect is to be answered by the application of principles identical with those by which the question is determined in relation to statutes, the question whether it is capable of having such an effect depends upon the scope of the enabling power.

In Malaysia, the case under appeal seems to be the first reported case, directly on the point and in Singapore there is also one such case, ie *A-G v. Gold Storage (Singapore) Pte Ltd* [1979] 1 MLJ 277, which held the view contrary to that in the case in the court below and concerned therein.

In the Singapore case, s. 28(1) of the Port of Singapore Authority Act (Cap 73) first exempts premises vested in the Port of Singapore Authority from the operation of Municipal Ordinance and Local Government Ordinance 1957 and the by-laws thereunder.

Section 28(2) of the same Act also makes provision for application of the said Ordinance to such premises in the manner described therein by means of subsidiary legislation in the form of publication in the Gazette of a declaration or order by the relevant Minister.

The relevant Minister published on 19 March 1977 such a declaration which, to quote, 'shall be deemed to come into operation on 28 October 1976'. The respondent, the aggrieved corporate citizen, filed an originating summons for a declaration from the court that it was *ultra vires* the Act aforesaid.

Section 28(2) aforesaid it set out below:

> The Minister may, after consultation with the Authority, by order published in the gazette declare that any other provisions of the said Ordinances and by-laws or of any written law repealing or re-enacting the provisions thereof, shall apply to the premises of the Authority, and thereupon the same shall apply accordingly.

The High Court in Singapore held, *inter alia*, that the terms of s. 28(2) did not enable the declaration in question to be made with retrospective effect (the case in the High Court was unreported). On appeal to the Court of Appeal, Singapore, *inter alia*, with regard to the question of retrospective operation of the Minister's declaration, the High Court's decision on this point was overruled by reference to s. 23 of the Interpretation Act (Singapore), thus (at p. 277):

> Section 23(1) of the Interpretation Act provides that subsidiary legislation made under any Act or other lawful authority, unless it be otherwise provided in such subsidiary legislation, shall take effect and come into operation on the date of its publication in the Gazette. Subsection (2) of s. 23 provides that any such subsidiary legislation may be made to operate retrospectively to any date not being a date earlier than the commencement of the Act or the establishment of the authority by or under which such subsidiary legislation is made.

Section 23 mentioned above appears to be similar or the same in substance to s. 20 of our own Interpretation Acts set out above. Re-reading it, the proviso to s. 20 above can be ignored for the purpose of the present appeal as it relates to criminal offences.

We will reserve our further comments on this s. 20 of the Interpretation Acts while we attempt a very brief survey of the cases directly on the point in other common law jurisdictions.

There does not seem to be any decided English case (neither has any been cited to us) about such absence of express power to a delegated authority to legislate retrospectively and the consequent effect on such subsidiary legislation being made with retrospective effect notwithstanding the absence of such said express power.

The Australian case closest to but still not directly on the point in issue is *Broadcasting Co of Australia Pty Ltd & Ors v. Commonwealth* [1935] 52 CLR 52. In this case, under s. 10 of the Wireless Telegraphy Act 1905-1909, 'the Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act'.

By reg. 3 of the regulations made under the Act on 7 August 1928, the postmaster general may deduct an amount not exceeding 5 pence from certain licence fees, and this regulation 'shall be deemed to have commenced on 1 November 1927'. The High Court of Australia, while stressing that the validity of such regulations must depend on the precise term of the law conferring such power on the Governor-General, held that reg. 3 was invalid on ground of interference with concerned rights and also on the ground that no purpose of the Act was carried out.

Apparently, the High Court of Australia was not presented with an argument of the absence of such express power to legislate retrospectively being granted under the parent Act, ie the Wireless Telegraphy Act, to the Governor-General, so that it did not deal with it.

Such failure to deal with it is not considered amiss as all common law jurisdictions practice the adversarial system where it is left to the parties in a given case to present their respective cases in the best manner as appears to them and not for the court to direct or dictate to them as to how to conduct their cases. A court would not descend into the arena of the parties except possibly in one of those situations where not to do so would defeat the rights of a party altogether and to cause a gross injustice to him.

…

It is in India also like in Singapore, that the point was dealt with and decided directly, and in India, in favour of the argument that a delegated authority can only legislate retrospectively if it is authorized by the parent Act either expressly or by necessary implication to do so.

One of the Indian Supreme Court cases cited to us is *Dr Indramani v. WR Nathan & Ors* [1963] 1 SCR 721. In that case, under the relevant parent Act entitled Forward Contracts (Regulations) Act 1952, by its s. 12(1), 'the Central Government may, either on a request in writing received by it … from … or if in its opinion it is expedient so to do make by-laws for all or any of the matters specified in s. 11 … '. The question arose whether a by-law with retrospective effect made under s. 12 aforesaid was valid. The Indian Supreme Court after a review of cases in the High Court and Supreme Court, held that the Central Government had no power to make such a by-law with retrospective effect when s. 12 aforesaid did not expressly confer that power. It was held that the Parliament could legislate retrospectively under the Constitution subject to its limitations, but the same could not be said in the case of the delegated authority (*viz* the Central Government) exercising a delegated power as the scope of such delegated power was not co-extensive with that of Parliament. The Indian Supreme Court case affirmed the same ratio decidendi which emerged in an earlier Indian Supreme Court case of *Union of India v. Madan Gopal Kabra* [1954] 5 SCR 541.

We are, after anxious consideration, of the view that any subsidiary legislation can only be made with retrospective operation if it is authorized by an express power in, or by necessary implication from, its parent Act. We agree, with respect, with the Indian Supreme Court's cases and also subscribe to the overview in Britain as well as in Malaysia from the two books mentioned above, which is amply supported by the overtones and undertones of judgments of those cases (though not directly on the point) in all common law jurisdictions dealing with the presumption against retrospective operation of statutes in the absence of a contrary intention in them.

Therefore, in the parent Act in the instant case, s. 2 is the enabling section for the Regulations of 1986 and the Regulations of 1991. It does not confer any express power to the delegated authority, ie the Yang di-Pertuan Agong to legislate retrospectively. Though our brief description of the parent Act may make it possible that there may be some implied power to the delegated authority to legislate retrospectively, but such implication of such power is not a 'necessity', ie an essential one on the facts and circumstances of this case.

We are also of the opinion that our view is more consistent with the concept that power from any subsidiary legislation can never rise above that in its parent Act. We are inclined to this view notwithstanding the Singapore case cited above, which, with great respect, we do not propose to adopt.

We venture to give our reasons. An Interpretation Act is a statute, concerned, *prima facie*, with meanings of words used in statutes so that the same words can have uniform meanings as far as possible, particularly those words which occur frequently in the statutes, so that the same meanings need not be repeated in various statutes with much tedium. Section 20 of our Interpretation Acts refers to such retrospective subsidiary legislation which 'may be made'. These three words give rise to some ambiguity. They may mean that if it is made to operate retrospectively, it is by itself and nothing else, in order perfectly. They may also mean that it may be made on a certain underlying premise but unexpressed, ie only when it is enabled by its parent Act to do so. We lean towards the latter meaning. In a nutshelll, s. 20 with the limitation therein contained, merely permits the making of retrospective subsidiary legislation, but the source of such power for making it must come from a valid, competent source, eg statute of the legislature. If no such power is given, the delegated authority is not entitled to legislate retrospectively.

That complete reliance on s. 20 by itself may not be safe is illustrated in another way. Thus, eg *ex facie*, s. 25 seems broadly to reinforce the said former meaning of the said three words. Section 25 is set out below:

> Subsidiary legislation shall be deemed to be made under all powers thereunto enabling, whether or not it purports to be made in exercise of any particular power or powers.

But s. 23(1) of the same Interpretation Acts on the other hand, seems to lend weight to the latter meaning of the said three words, and s. 23(1) is set out below:

> Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

We are finally fortified in the view we hold of s. 20 of our Interpretation Acts by a dictum of Lord Morris of Borth-y-Gest who delivered the unanimous judgment of the Privy Council on an appeal from Australia in *Blue Metal Industries Ltd & Anor v. RW Dilley & Anor* [1970] AC 827. That complicated case concerned the language of s. 185 of the Companies Act 1961 (NSW), in connection with the merger of companies through the compulsory acquisition or transfer of shares of one company to another. It was sought, *inter alia*, to be argued for the appellant that the said s. 185 applied to the transfer of shares in one company to two other companies jointly, and not only the transfer of shares to another company alone because, in the Interpretation Act 1897 (NSW) words in the singular would include the plural, and *vice versa* unless the contrary intention appeared, as in other similar provisions of the Interpretation Act of some other countries.

In his reply, the learned counsel for the respondent submitted that the Exemption Order was valid and that this court has no right to declare the Exemption Order to be null and void because there was no application by the appellants to declare it null and void.

The respondent's counsel submitted that the Minister, in promulgating the Exemption Order, was exercising his power under s. 2B of the Act. As can be seen under s. 2B the Minister has the power to exempt any person or body from the provisions of the Act. The Minister could make the Exemption Order to have retrospective effect by virtue of s. 20 of the Interpretation Acts 1948 and 1967. As such the Exemption Order was validly made. It is clear that the Exemption Order exempted the respondent, being a contractor of Petronas, from the provisions of Part XII of the Act. The Exemption Order was to take effect from 1 October 1974 although it was gazetted on 10 October 1997. This covered the claims by the appellants. The only way that the appellants were to have their claims be heard by the Labour Court was to have the Exemption Order be declared null and void. The appellants did not make such an application and that the Minister must be made a party.

The respondent's counsel also submitted that *Kerajaan Malaysia v. Wong Pot Heng & Anor* and *National Land Finance Cooperative Society Ltd v. Director-General of Inland Revenue* could easily be distinguished because in those cases the vested rights had been established, whereas in the present appeal they were

only claims. With the greatest respect to the learned counsel, we are of the view that the claims by the appellants in the present appeal are rights accrued to the appellants but were taken away by the Exemption Order. Without the Exemption Order, it is obvious to us that the appellants were entitled to those claims as provided by Part XII of the Act. The appellants, according to the claims, were working on those days which were supposed to be their rest days. When they filed their claims on 19 February 1995 with the Labour Department, Dungun, Terengganu, the Exemption Order was non-existent in that it had not been promulgated and gazetted. In our view, by filing their claims with the Labour Department, the appellants had already established their rights. These rights were taken away because of the retrospective effect of the Exemption Order which was only gazetted on 10 October 1997. As such, there is no merit in the submission of the respondent that the claims by the appellants were not rights protected by the law.

The respondent's counsel also submitted that the case of *Kerajaan Malaysia v. Wong Pot Heng & Anor* has no application to the present appeal because the Exemption Order was made after s. 20 of the Interpretation Acts had been amended. He went on to submit that s. 20 was amended as a result of the decision in *Wong Pot Heng & Anor* as can be seen from the explanatory statement to the Bill amending s. 20. It may be true that s.20 was amended to overcome the problems created by the judgment in *Wong Pot Heng & Anor* but the issue here is whether the amendment had the desired effect. The explanatory statement might have stated that but it is not the law. We have to examine the amended s. 20 itself whether it had the desired effect. Section 20 before the amendment provides as follows:

> 20. Subsidiary legislation may be retrospective
>
> Subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made.

For the sake of completeness, I will repeat the provision of s. 20 after it was amended:

> 20. Subsidiary legislation may be retrospective.
>
> *Notwithstanding the absence of any express provision in any Act or other written law empowers any person to make subsidiary legislation, such* subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under

a which it is made or, where different provisions of the law come into operation on different dates, the commencement of that law under which it is made. (emphasis made).

The amendment was adding the words "Notwithstanding the absence of any express provision in any Act or other written law empowers any person to make b subsidiary legislation, such …" to the original s. 20. The decision of *Wong Pot Heng & Anor* made it clear that a person is empowered to make subsidiary legislation only when the parent Act provides the person with such power. For that subsidiary legislation to have retrospective effect the parent Act must also provide that person to make the subsidiary legislation with retrospective effect. c This power could not be provided by s. 20 of the Interpretation Acts. It was contended in *Wong Pot Heng & Anor* even though the Yang di-Pertuan Agong was not provided with the power to make subsidiary legislation with retrospective effect by the parent Act, he could do so by s. 20 of the Interpretation Acts which empowered him to do. This contention was rejected d by the High Court and the Federal Court. The Federal Court went on to state that the Interpretation Acts are nothing more than interpreting words and phrases of the statutes. They have no legislative power to provide a person to make a subsidiary legislation with retrospective effect. The power for a person to make a subsidiary legislation must be provided by the parent Act itself and not by e the provisions of the Interpretation Acts. The full explanation is stated in the judgments we have cited earlier. Though s. 20 of the Interpretation Acts had been amended by the addition of several words it would not change their character as Interpretation Acts. For that reason, the decision of *Wong Pot Heng & Anor* is still binding and the amendment to s. 20 had not changed the situation. In order to give the Exemption Order its retrospective effect, the Act f must make provisions for it. There is no such provisions in the Act.

The appellants' counsel submitted that s. 30 of the Interpretation Acts protects the rights of the appellants. Section 30 provides as follows:

g 30. Matters not affected by repeal.

(1) The repeal of a written law in whole or in part shall not:

(a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or

h (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or

(c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or

i

(d) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,

and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made.

This section had been discussed at great length in *Wong Pot Heng & Anor*. For the purposes of this appeal the provisions of s. 30(b) and (d) of the Interpretation Acts are relevant. In our view, the rights protected by s. 30(b) and (d) were rights derived from the common law of England. The High Court and the Federal Court in *Wong Pot Heng & Anor* made it clear that a vested or an accrued right cannot be taken away because of the protection given by s. 30 of the Interpretation Acts. A vested or an accrued right could not be taken away by a legislation or subsidiary legislation with retrospective effect which have the effect of repealing a vested or an accrued right such as repealing the provisions giving the vested or accrued right. The authorities we have cited above affirm this view.

In *Maxwell v. Murphy* [1957] 96 CLR 261:

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Mellish LJ in *Republic of Costa Rica v.* Erlanger. "No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done".

The distinction is clear enough in principle and its foundation in justice is apparent. But difficulties have always attended its application. In some cases they have been due to the discovery in the nature or context of the legislation or in its subject matter of indications, whether faint and conjectural or strong and persuasive, of a desire to cover situations already existing. In other cases the difficulty has been traceable to the inveterate tendency of English law to

regard some matters as evidentiary or procedural which in reality must operate to impair or destroy rights in substance. Again, enactments in truth conferring or denying rights are not seldom expressed in terms of remedy. There is a tacit recognition of this in the manner in which Lord Penzance (then Wilde B) stated the rule in a passage that has been much quoted – "the rule applicable to cases of this sort is that, when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act" – *Wright v. Hale* [1860] 6 H & N 227 at p. 232. [158 ER 94 at p. 96.

The rule or rules governing the presumption against the operation of new laws upon rights that have already accrued or immunities that have already been established or acquired must be reconciled or accommodated with the rule that the repeal of a provision makes it as if it had never been enacted. It is to this that the exceptions, already described, of the former rule are directed. In the case cited above, *Butcher v. Henderson* [1868] LR 3 QB 335, this is clearly put by Blackburn J as follows: "The maxim alike of law and justice is, '*Nova constitutio futuris formam imponere debet, non praeteritis,*' and therefore, though when a statute is repealed, it is as to new matters as though it had never existed, yet as to transactions already completed under it, it still has full effect".

In *Yrttiaho v. Public Curator (Q)* [1971] 125 CLR 228 at p 245, Gibb J said:

Plainly enough, para (e) and the words which follows it require that, unless the contrary intention appears, an amending enactment shall be construed so that, notwithstanding the amendment, proceedings pending thereunder at the time of the amendment can be continued, and proceedings can be initiated after the amendment in respect of substantive right acquired before the amendment took effect'.

Para (a) cited is similar to s. 30(1)(d) of the Interpretation Acts. Edgar Joseph Jr. J in *Lim Phin Khian v. Kho Su Ming* [1996]1 MLJ 1 said:

The general rules of the common law aforesaid have been reinforced by s. 30(1)(b) and (d) of the Interpretation Act, which, omitting immaterial parts, provides that, 'The repeal of a written law in whole or in part shall not … (b) affect any right … accrued … under the repealed law; … (d) affect any … legal proceeding or remedy in respect of any such right …', unless, as qualified in its application by s. 2(3), there is 'express provision to the contrary' or 'something in the subject or context inconsistent with or repugnant to its application'.

In the present appeal, we are of the view the appellants have acquired those rights when they filed their claims against the respondent in respect of working during holidays and overtime which they were entitled to under Part XII of the Act. When they filed their claims with the Labour Department, Dungun, the Exemption Order was non-existent and as such their claims became accrued or vested rights and therefore protected by s. 30 of the Interpretation Acts. The Exemption Order which has the effect of exempting the respondent from the provisions of Part XII have no effect on the claims by the appellants even though it had retrospective effect because of the protection given by s. 30 of the Interpretation Acts.

Furthermore, s. 30(1) of the Interpretation Acts provides that "any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been made". This provision gives additional protection to legal proceedings which had been instituted in respect of those rights. The claims by the appellants should be proceeded upon by the Labour Court on their merits as if the Exemption Order had not been made. In our view, the learned counsel for the respondent who appeared in the Labour Court was in error when he raised the preliminary objection in respect of the proceedings. He should take heed of s. 30 of the Interpretation Acts.

In our view, the effect of s. 30(1) of the Interpretation Acts is not to have the Exemption Order be declared null and void but gives right which was filed before the Exemption Order was promulgated (in this case the date of the gazette) would be proceeded upon as if the Exemption Order was never made.

The appellants' counsel submitted that the claims were not only protected by s. 30 of the Interpretation Acts, but also by the provisions of ss. 7 and 7A of the Act. He went on to say that the Act was enacted by Parliament for the benefit of the workers (employees). The Act, he said, was a social legislation for the protection of the workers and as such any provision of the Act which is for the benefit of the workers should be construed strictly in favour of the workers and not in favour of the employers. This is the protection provided for by ss. 7 and 7A of the Act:

> 7. More favourable conditions of service under the Act to prevail.
>
> Subject to section 7A, any term or condition of a contract of service or of an agreement, whether such contract or agreement was entered into before or after the coming into force of this Act, which provides a term or condition of service which is less favourable to an employee than a term or condition of service prescribed by this Act or any regulations, order or other subsidiary

legislation whatsoever made thereunder shall be void and of no effect to that extent and the more favourable provisions of this Act or any regulations or other subsidiary legislation whatsoever made thereunder shall be substituted therefore.

7A. Validity of any term or condition of service which is more favourable.

Subject to any express prohibition under this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder, nothing in section 7 shall be construed as preventing an employer and an employee from agreeing to any term or condition of service under which an employee is employed, or shall render invalid any term or condition of service stipulated in any collective agreement or in any award of the Industrial Court, which is more favourable to the employee than the provisions of this Act or any regulations, order, or other subsidiary legislation whatsoever made thereunder.

The appellants contended that where an employee (worker) entered into a contract of service with his employer, any term or condition under the contract which is less favourable than the one prescribed by the Act, subsidiary legislation or an order, that term or condition of the contract would be invalid and the term or condition as prescribed by the Act should prevail and deemed to replace the term or condition stated in the contract of service as provided for by s. 7 of the Act. On the other hand, s. 7A of the Act permits an employee to enter into a contract of service with his employer where the terms and conditions are more favourable than those prescribed by the Act, subsidiary legislation or an order. It is also permissible for terms and conditions more favourable to the employees be made under a collective agreement or an award of the Industrial Court than those prescribed by the Act, a subsidiary legislation or an order. In other words, terms and conditions which are more favourable to the employees than those prescribed by the law should be upheld. On the other hand, where the terms and conditions are less favourable to the employees than those prescribed by the law, the terms and conditions prescribed by the law shall prevail. This is the protection provided for by s. 7A of the Act to the employees.

The appellants contended that Part XII of the Act, amongst others, provides the terms and conditions for employees to work on weekly holidays, annual leave and overtime and the compensation to be paid for working on those days. In this appeal, we are not sure whether the claims were in accordance with the rates as specified in Part XII of the Act or under the collective agreement, but it does not matter because whatever rate applicable they were claims under Part XII of the Act, which the Exemption Order applies. It was submitted that

the appellants' claims in the present appeal could not be taken by the Exemption Order because of the protection provided by ss. 7 and 7A of the Act. It is clear that the Exemption Order provides for terms and conditions which were less favourable than those prescribed by Part XII of the Act or the collective agreement. The Exemption Order not only made the terms and conditions less favourable but had the effect of defeating the claims by the appellants under Part XII or the collective agreement totally.

There are merits in the contention of the appellants. In our view, there is no necessity for us to decide the merits on the protection provided by ss. 7 and 7A of the Act because the protection provided for by s. 30 of the Interpretation Acts is more than sufficient to protect the claims of the appellants. It is more so because the claims are accrued or vested rights for which legal proceedings had commenced when they filed their claims with the Labour Department, Dungun.

It was contended by the respondent's counsel that the only way the appellants could maintain their claims was to have the Exemption Order be declared null and void. This found favour by the High Court. As we have stated earlier, s. 30 of the Interpretation Acts gave the necessary protection to the claims by the appellants and the legal proceedings instituted by the appellants. In our view, the protection given by s. 30 of the Interpretation Acts would not affect the legality of the Exemption Order as stated by that section. Section 30 of the Interpretation Acts made it clear that as against the claims of the appellants which had already been filed in the Labour Court, Dungun, the Exemption Order would be of no effect as if it was not legislated. In our opinion, it was not in the interest of the appellants to invalidate the Exemption Order. The appellants were only interested to have their claims heard and that they be paid the claims. To be fair to the appellants, when the matters came up for hearing in December, the Exemption Order had just been gazetted about two months earlier. It is doubtful whether the appellants and their counsel were aware of the existence of the Exemption Order. At the hearing of the case, the counsel for the respondent suddenly raised the issue of jurisdiction based on the Exemption Order. The Labour Court upheld the objection and ruled that it had no jurisdiction to hear the appellants' claims on their merits because of the Exemption Order. On appeal to the High Court, the learned judge dismissed the appeal simply on the ground that the Labour Court had no jurisdiction until the Exemption Order is declared null and void.

a In our view both the Labour Court and the High Court had erred in refusing to hear the claims by the appellants. The Exemption Order does not affect the claims of the appellants filed in court (the Labour Court in Dungun) in 1995 which is a legal proceeding pending and as such protected by s. 30 of the Interpretation Acts.

b We will, therefore, allow the appeal by the appellants with costs here and below. This appeal is to be remitted to the Labour Court to hear the claims of the appellants on their merits. The deposit is to be refunded to the appellants.

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